

Noot onder Special Court for Sierra Leone

Citation for published version (APA):

Klip, A. H. (2006). Noot onder Special Court for Sierra Leone. In A. Klip, & G. K. Sluiter (Eds.), *noot onder Special Court for Sierra Leone, Annotated Leading Cases of International Criminal Tribunes, Volume IX: The special Court for Sierra Leone 2003-2004* (pp. 726-731-741-742). Intersentia. Annotated Leading Cases of International Criminal Tribunes No. IX

Document status and date:

Published: 01/01/2006

Document Version:

Accepted author manuscript (Peer reviewed / editorial board version)

Please check the document version of this publication:

- A submitted manuscript is the version of the article upon submission and before peer-review. There can be important differences between the submitted version and the official published version of record. People interested in the research are advised to contact the author for the final version of the publication, or visit the DOI to the publisher's website.
- The final author version and the galley proof are versions of the publication after peer review.
- The final published version features the final layout of the paper including the volume, issue and page numbers.

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I. Introduction

These three decisions specifically deal with the relationship between the Special Court and the Truth and Reconciliation Commission. This is much more than purely a legal matter. The legal questions that result from the relationship stem from a much broader context in which states struggle with their past. States try to come to terms with the dark pages of their recent history. The methods of doing that differ from state to state and depend on the will of the new regime, the infrastructure of a specific country and the character of the conflict. Whereas some states do not respond to atrocities committed on their territory at all, other establish a Truth and Reconciliation Commission or provide for criminal prosecution before a special tribunal. Sierra Leone is an interesting state in the sense that it has both a Special Court for which accused stand trial and did have a Truth and Reconciliation Commission. In my comments I will also reflect on other states that are/ were in a comparable situation: South Africa and East Timor. South Africa has become famous for its TRC led by Archbishop Tutu. However, very few prosecutions have been initiated there. East Timor is a special case of its own; the trials conducted by the Special Chambers of the Dili District Court have come to an end on 20 May 2005. During the entire period of its operation a Commission for Reception, Truth and Reconciliation was in existence.¹ In addition to these two institutions a binational Commission for Truth and Friendship was established between Indonesia and East Timor at the end of 2004.

II. The cases at hand

Two accused before the Special Court, Norman and Gbao, wanted to participate in the hearings of the TRC in Sierra Leone. One may question what interest accused might have to take the risk of testifying under oath before a TRC, while standing trial at the same time in a criminal court. To prevent the risk of self-incrimination, counsel for Norman discouraged their client to testify at the TRC hearing.² However, accused might

¹ At the time of finalising this commentary it has not published its Report.

² William A. Schabas, Conjoined Twins of Transitional Justice?, 2 Journal of International Criminal Justice 2004, p. 1092.

have a different view: some accused simply want to talk. They obviously saw the impact of testimony at those hearings and wanted to be given a chance to present their view on the whole conflict, or as President Robertson put it: “they wanted a right to reply.”³ Their point of view was endorsed by the TRC itself, that had named Norman and Gbao as perpetrators and wanted to hear their testimony. In first instance Judge Thompson denied the joint request of the accused and the TRC.⁴ On appeal, Judge Robertson allowed Norman to send something in writing to the TRC.⁵

III. Legal aspects of the relationship between the TRC and the Special Court in Sierra Leone

Neither the Statute of the Special Court for Sierra Leone⁶ nor the Agreement between the United Nations and the government of Sierra Leone on the Establishment of a Special Court for Sierra Leone clarify the relationship between the two institutions. In his Report to the Security Council, the United Nations’ Secretary-General stated “that it is envisaged that upon the establishment of the Special Court and the appointment of its Prosecutor, relationship and cooperation arrangements would be required between the Prosecutor regarding and the National Truth and Reconciliation Commission, including the use of the Commission as an alternative to prosecution, and the prosecution of juveniles, in particular.”⁷ Despite a few conferences on cooperation no agreement was

³ Decision on Appeal by the Truth and Reconciliation Commission for Sierra Leone (“TRC” or “the Commission”) and Chief Samuel Hinga Norman JP against the decision of his lordship, mr Justice Bankole Thompson delivered on 30 October 2003 to deny the TRC’s request to hold a public hearing with Chief Samuel Hinga Norman JP, case No. SCSL-2003-08-PT, 28 November 2003, President Robertson, hereafter Appeal Decision, in this volume, **PAGINA**, par.18.

⁴ Decision on the request by the Truth and Reconciliation Commission of Sierra Leone to conduct a public hearing with Samuel Hinga Norman, Case No. SCSL-2003-08PT, Judge Thompson, 29 October 2003, hereafter Norman decision, in this volume, **PAGINA**, p.. An almost identical decision was taken in the case of Gbao, Decision on the Request by the Truth and Reconciliation Commission of Sierra Leone to Conduct a Public Hearing with Augustine Gbao, *Prosecutor v. Augustine Gbao*, Case No. SCSL-2003-09-PT, Judge Thompson, 3 November 2003, not published in this series.

⁵ This decision set off a storm of angry editorials and a heated exchange of press releases and statements between the two institutions. See Elizabeth M. Evenson, Truth and Justice in Sierra Leone: Coordination between Commission and Court, 104 Columbia Law Review 2004, p.759.

⁶ UN Doc. S2000/915, as amended by agreement between the United Nations and the Government of Sierra Leone, 16 January 2002, published in: Archbold International Criminal Courts, Practice Procedure and Evidence, Sweet and Maxwell, London 2003, p. 1176.

⁷ Report of the Secretary General on the establishment of a Special Court for Sierra Leone, UN Doc. S2000/915, October 4, 2000.

ever reached.⁸ This is especially strange, because the TRC was established in 2000,⁹ two years before the final agreement with the United Nations that led to the establishment of the Special Court. The chronology does explain though, that there is hardly any reference to the possibility of criminal prosecution in the basic documents of the Truth and Reconciliation Commission: it was simply not foreseen at the time of setting up the Commission.

The Truth and Reconciliation Commission itself describes the history as follows:

“Given the pardon and amnesty provisions of the Lomé Peace Agreement, the Commission was proposed as an alternative to criminal justice in order to establish accountability for the atrocities that had been committed during the conflict. The Special Court was created after the abandonment of the amnesty provisions (or certain of them) following breaches of the Lomé Peace Agreement by elements within the RUF.”¹⁰ The Special Court Agreement 2002 Ratification Act does not refer to the TRC,¹¹ neither do the Rules of Procedure and Evidence of the Special Court.¹² Despite this, Judge Robertson interprets the Statute in a way that the Special Court has primacy over all national bodies: “The Special Court was given, by Article 8 of its Statute, a primacy over the national courts of Sierra Leone (and, by implication, over national bodies like the TRC).”¹³

Although in general the co-existence of a Court and a Truth and Reconciliation Commission is problematic, the potential for conflict was slim.¹⁴ In particular, since the Prosecutor at the Special Court had announced that he would not make use of any

⁸ See Briefing Paper on Relationship between the Special Court and the Truth and Reconciliation Commission, http://www.specialcourt.org/documents/PlanningMission/BriefingPapers/TRC_SpCt.html, visited on 7 July 2005. See also Marieke Wierda, Priscilla Hayner and Paul van Zyl, Exploring the Relationship between the Special Court and the Truth and Reconciliation Commission of Sierra Leone, <http://www.ictj.org>, visited on 4 July 2005.

⁹ Truth and Reconciliation Act, February 2000, published in: M. Cherif Bassiouni, Post-Conflict Justice, Transnational Publishers, New York 2002, p.595.

¹⁰ Overview of Sierra Leone Truth and Reconciliation Report, par. 25, p.8, www.nuigalway.ie/human_rights/publications.html, visited at 13 July 2005; William A. Schabas, Internationalized Courts and their Relationship with Alternative Accountability Mechanisms: The Case of Sierra Leone, in: Internationalized Criminal Courts, Cesare P.R. Romano/ André Nollkaemper/ Jann K. Kleffner, Oxford University Press 2004, p.165.

¹¹ Published in: Archbold International Criminal Courts, Practice Procedure and Evidence, Sweet and Maxwell, London 2003, p. 1189.

¹² Rules of Procedure and Evidence of the Special Court for Sierra Leone, as amended at Sixth Plenary, 14 May 2005.

¹³ Appeal Decision, par.4.

material produced by the TRC as evidence.¹⁵ But this does not bind the defence, as Judge Robertson correctly states in his decision. In addition, no agreement on cooperation was reached between the two institutions. The TRC almost ended its activities before the start of the trials before the Special Court. However, during the last days of the hearings of the TRC, a number of accused were already in detention on remand. It is to some of these, that the decisions relate.

As a result of the wish of the TRC to have detainees testifying at its hearings the Registrar adopted a “Practice Direction on the procedure following a request by a State, the Truth and Reconciliation Commission, or other legitimate authority to take a statement from a person in the custody of the Special Court for Sierra Leone” on 9 September 2003, which was amended on 4 October 2003.¹⁶ Despite the silence of the RPE, the Registrar regarded Rule 33 (D) RPE as the legal basis for doing so. Paragraph 5 of the Practice Direction contains two grounds for rejection of the request: the interest of justice, as well as the maintenance of the integrity of the proceedings of the Special Court.

IV. Aspects of the right to a fair trial and the interests of justice

The Prosecutor opposed the request because she was afraid that the permission to speak at a public hearing would have consequences to the right to a fair trial and have adverse effects on victims and witnesses. The question raised is whether such a phenomenon will weaken the institution of justice. In his denial of the request Judge Thompson holds that the right to a fair trial should always prevail.¹⁷ It is interesting to see that Judge

¹⁴ See Appeal decision, par. 6; Elizabeth M. Evenson, Truth and Justice in Sierra Leone: Coordination between Commission and Court, 104 Columbia Law Review 2004, p.731.

¹⁵ Also the TRC had made clear that it would not share confidential information with the Court. See for instance Abdul Tejan-Cole, The Complementarity and Conflicting Relationship Between the Special Court for Sierra Leone and the Truth and Reconciliation Commission, 6 Yale Human Rights and Development Law Journal 2003, p.154-155; W. Schabas, The Relationship Between Truth Commissions and International Courts: The Case of Sierra Leone, 25 Human Rights Quarterly 2003, p.1051.

¹⁶ See on page 13-15 of the Appeal decision, in this volume **PAGINA**. See also <http://www.sc-sl.org/practicedirection-090903.html>, visited at 29 June 2005. The Practice Direction was amended on 4 October, to meet TRC objections to the first version, see Appeal Decision, par. 22, in this volume **PAGINA**. NB: Wat is er gewijzigd op 4 October? Schabas p.1094 JJJC zegt er het eea over Göran hoe kom ik aan de thans niet meer geldende tekst?.

¹⁷ See Norman decision, in this volume, **PAGINA**, par. 14.

Robertson in the Appeal decision extends the notion of a fair trial also on to other indictees who might be subjected to public attacks which they could not answer.¹⁸

The presumption of innocence plays a role in the sense that the TRC invited the accused as a “perpetrator” in the meaning of the TRC Act. (see also Rule 4 (d) Practice Direction.). Schabas argues that the presumption of innocence belongs to Norman and he chose to abandon it.¹⁹ Although that is certainly correct, it raises the question what the consequences of the acceptance by the accused of the invitation by the TRC to testify at a hearing as a perpetrator are for his procedural attitude in the criminal trial, in which the accused pleaded not guilty. For Judge Robertson on appeal, it was almost self-evident that an accused may not be subjected to a procedure in which he risks prosecution for having committed perjury under oath.²⁰ The Practice Direction does protect a detainee from incriminating himself since the detainee is not obliged to correspond with the TRC.²¹ Schabas criticizes that Robertson gave Norman and the TRC something they already had.²² It is interesting to see that Judge Robertson did not see any impediment in the risk of self-incrimination by means of written evidence.

I was unable to follow the argumentation of Boister that the right to a public hearing should have led the Special Court to decide to allow Norman to testify before the TRC.²³ The right to a public hearing was not denied to the accused that wanted to testify before the TRC. However, the human right to a public hearing to which an accused in a criminal trial is entitled to, also under the Statute of the Special Court (Article 17, paragraph 2), was still to come for Norman and Gbao at the moment of the decision of Judge Robertson for obvious reasons. The Truth and Reconciliation Act does not give an individual such a right, because no criminal trial is conducted before that commission.

V. Concurrent or alternative responses to human right violations

¹⁸ Appeal decision, in this volume, **PAGINA**, par. 28.

¹⁹ Schabas, in Romano, p.169.

²⁰ See Appeal decision, in this volume **PAGINA**, par. 38 and 39.

²¹ The TRC’s criticism that the Practice Direction violates this specific right is without substance. See Findings, par.571, p.80.

²² Schabas, in Romano, p.169.

It is very interesting to see the conflict emerging between the somewhat less legal argumentation of the TRC and the purely legal argumentation of the Special Court. See for instance Judge Thompson: “The Truth and Reconciliation Act, 2000 is predicated upon the notion of restorative justice which aims at the reconciliation of *self-confessed perpetrators, victims and the state as a whole*. Once a person has been indicted, he does not fall within the statutory ambit of the Act.”²⁴ Also Judge Robertson uses strong vocabulary with regard to the appearance of the hearing: “the event will have the appearance of a trial” without being it.²⁵ Applicants were unable to explain why only public testimony can perform the functions. The initially requested two-private interview might have been granted.

The Appeals decision regards the duty to prosecute as overriding any other response.²⁶ The Special Court and the TRC are complementary. That seems to mean that there is a kind of equality between the two. However, in the final evaluation of the interests involved, the duty to prosecute is overriding. In this context it is most interesting to see the method of argumentation followed by Judge Robertson. He disqualifies the solution followed by the South African TRC as “plea-bargains”. In addition to the arguments given in the decision, one should consider the fact that whereas the South African TRC presented perpetrators with a clear dilemma: either to testify and give full disclosure for the acts committed and receive amnesty for political motivated acts; or to remain silent and be prosecuted.²⁷ However, as of to date in 2005, it has gradually become clear that those who did not testify at hearings of the South African TRC, will no longer be prosecuted. South Africa did not provide the Director of Public Prosecutions for the necessary funds and personnel to perform such a task.

Whereas Judge Thompson saw the whole issue as an existential issue between to extremes: either allow the request or deny it, Judge Robertson tries to find something of a balance between the interests involved. It is interesting to follow the thread of his argumentation in which he tries to reconcile the tasks of the TRC and the Special Court.

²³ See Neil Boister, Failing to get to the Heart of the Matter in Sierra Leone?, 2 Journal of International Criminal Justice 2004, p. 1110-1117.

²⁴ Norman decision, in this volume **PAGINA**, par. 12.

²⁵ Appeals Decision, in this volume **PAGINA**, par. 30.

²⁶ See Appeal decision, in this volume **PAGINA**, par. 4 , 33 and 44.

The TRC has basically two tasks: to establish the truth and to further reconciliation. He notes that the TRC needs the accused Norman in pursuance of the first task.²⁸ The President, on evaluation, finds that this interest is not harmed by a non-public participation of Norman and follows the solution chosen by Peru and allows a written statement together with a affidavit.²⁹

From its numerous reactions, it is clear that the TRC does not regard its interests well reflected in the decision of the President. In its Report, the Sierra Leone TRC comes back to this issue time and time again.³⁰ However, the repetition of its standpoint without presenting any new argument is not convincing in the sense that the Special Court ought to have decided differently. Especially given the fact that it was clear from its establishment that the Special Court would only try a very low number of detainees. It is hard to understand, even in view of their status in the conflict, that the impossibility of oral testimony of a dozen people, has drastically undermined the operations and the success of the TRC.³¹ The only moment at which the TRC considers the interests of criminal trials, is when it proposes to reflect on the so-called “use immunity”.³² Schabas suggested to solve the problem of use immunity for testimony delivered before the TRC by amending the RPE.³³ A minor change to Rule 90(E) SCSL RPE could have solved the problem. Whereas the TRC blames the (judges of the) Special Court for creating a problem, the origin of the problem lies much earlier in time. It is much more likely that the problems in convincing people to testify before the TRC, as it describes, were caused by the distrust of the people after the general amnesty which was provided in the Lomé Peace Agreement was repealed.³⁴

²⁷ See Promotion of National Unity and Reconciliation Act 34 of 1995.

²⁸ Appeal decision, in this volume **PAGINA**, par. 19.

²⁹ Appeal decision, in this volume **PAGINA**, par. 41. Decision on Appeal by the Truth and Reconciliation Commission for Sierra Leone (“TRC”) and accused against the decision of Judge Bankole Thompson delivered on 3 November 2003 to deny the TRC’s request to hold a public hearing with Augustine Gbao, Case No. SCSL-04-15-PT, 7 May 2004, Acting President Winter, in this volume, **PAGINA**, The Appeal Decision in the Gbao case demonstrates that the successor of President Robertson, Judge Winter, follows the same policy with regard to this relationship.

³⁰ See Overview, par.26, p.8; See Findings, Volume Two, Chapter Two, par.554-557, p.78; par.563-573, p.79-80; Recommendations, Volume Two, Chapter Three, par.475, 476, 478, 479, p.67-68.

³¹ Even Schabas acknowledges that the willingness of some perpetrators in public before the Commission “suggest the relative insignificance of the threat of prosecution.” Schabas in Romano et al, p.167.

³² See Recommendations, par.476, p.68.

³³ William A. Schabas, Conjoined twins of Transitional Justice?, 2 Journal of International Criminal Justice 2004, p. 1098; idem Human Rights Quarterly, p.1053-1056.

³⁴ See on the influence of the withdrawn amnesty on the TRC process W. Schabas, The Relationship Between Truth Commissions and International Courts: The Case of Sierra Leone, 25 Human Rights Quarterly 2003, p.1052.

VI. Comparison with South Africa and East Timor

The co-existence of criminal courts and TRC's is not unique to Sierra Leone. It may therefore be of interest to investigate how other states have dealt with this issue. In South Africa, the threat of criminal prosecution triggered the willingness of people to testify before the TRC. Under the Promotion of National Unity and Reconciliation Act 1995 any person could apply for amnesty for offences that were committed with a political motive. This construction eliminated in South Africa problems of the kind of the Sierra Leonean cases under discussion. Does this mean that the South African way is an example or even a blue print to other similar situations? I hesitate on this issue. Back in 1994 the relationship was presented in a very clear and simple way: perpetrators either apply for amnesty and if such amnesty is given they are immune for prosecution or they do not apply or receive amnesty and will subsequently be prosecuted. The hearings of the South African TRC are generally regarded as a great success and an enormous contribution to reconciliation and stability in South Africa.³⁵ However, since the conclusion of the Final Report of the South African TRC,³⁶ hardly any prosecution has been initiated. To the contrary, it has become clear that not many prosecutions are going to take place.³⁷ What are the consequences for other situations? I may cite here Parker's observation: "an indemnity presents itself as a unique and magnanimous strategy for burying the conflicts of the past. Its effect on the future is ignored."³⁸ When even in states like South Africa in which non-disclosure by perpetrators is under explicit threat of prosecution, there is no consequence, it will demonstrate to perpetrators that if they want to evade justice, it is still the best to remain silent and wait until it is over.

There seems to be an implicit consensus on this sensitive issue among the political forces in South Africa for two reasons: all parties in the South African conflict might

³⁵ See for instance Jeremy Sarkin, *Carrots and Sticks: The TRC and the South African Amnesty Process*, Intersentia Antwerp/ Oxford 2004, p. 6.

³⁶ Truth and Reconciliation Commission of South Africa Report, Macmillan Oxford 1999, Vols. 1-5, Juta & Co Ltd, Kenwyn, Cape Town 2003, Vols. 6-7.

³⁷ See on the relationship between the TRC and criminal courts Mervyn E. Bennun, Some procedural issues relating to post-TRC prosecutions of human rights offenders, 16 *South African Journal of Criminal Justice* 2003, p.17-37; Jeremy Sarkin, The Trial and Tribulations of South Africa's Truth and Reconciliation Commission, 12 *South African Journal on Human Rights* 1996, p. 617-640.

suffer from criminal prosecutions and prosecutions are extremely costly and have an uncertain outcome.³⁹ There is another reason that the South African model may not be easily transplanted to another type of conflict and this lies in the South African history. There is a long tradition of amnesties dating from 1922 for all kinds of offences with has created a different context in South Africa.⁴⁰

In East Timor, a potential for tension between the TRC and the Special Chambers lay in the fact that the TRC was only to investigate less serious offences whereas the Special Chambers were to deal with serious offences.⁴¹ Others have pointed at some similarities between the TRC and a criminal court when it comes to its powers or the way the investigations are conducted.⁴² The two institutions in East Timor practised the so-called free access method by which they could get hold of their mutual evidence.⁴³ It did not lead to any specific legal dispute. However, on my visit to Dili in July 2004, I noticed that to quite a number of victims and witnesses it was unclear what the difference of the CRTR and Special Panels were. This may be due to illiteracy of the majority of the East Timorese, as well as to a differing legal culture. Similar things were found by the Sierra Leone TRC that stated that “the failure to clearly demarcate the roles and functions of the two bodies, together with the highly uncertain nature of the relationship between them, led to a great deal of confusion in the minds of the public.”⁴⁴

VII. Concluding remarks

³⁸ See Peter Parker, The politics of indemnities, truth telling and reconciliation in South Africa/ Ending apartheid without forgetting, 17 Human Rights Law Journal 1996, p. 12.

³⁹ See Jeremy Sarkin, Carrots and Sticks: The TRC and the South African Amnesty Process, Intersentia Antwerp/ Oxford 2004, Chapter 4 After the Amnesty Process: Prosecutions or Another Amnesty, p.363-390. See on the question of compliance of a national amnesty with international law Andreas O’Shea, Amnesty for Crime in International Law and Practice, Kluwer Law International 2004.

⁴⁰ See Jaco Loots and Willemien du Plessis, Vrywaringswetgewing en die Waarheidskommissie – nog is ’t einde niet, 12 SA Publiekreg 1997, p.119-150.

⁴¹ See Beth L. Syons, Getting Untrapped, Struggling for Truths: The Commission for the Reception, Truth and Reconciliation (CAVR) in East Timor, in: Cesare P.R. Romano/ André Nollkaemper/ Jann K. Kleffner, Internationalized Criminal Courts, Oxford University Press New York 2004, p.100.

⁴² See Jennifer L. Poole, Post-Conflict Justice in Sierra Leone, in: M. Cherif Bassiouni, Post-Conflict Justice, Transnational Publishers, New York 2002, p. 579.

⁴³ Evenson describes the East Timor model as one in which the institutions are no rivals. See Evenson, p.754.

⁴⁴ Findings, par.567, p.79. See for the Commission own attempt to make the distinctions clear in a simple way: Truth and Reconciliation Commission Report, For the Children of Sierra Leone, Child-Friendly Version, September 2004, Accra Ghana, p.10.

In my view the whole dispute was partly about primacy. The TRC being afraid that it could not have access to the most important witnesses and the Special Court being afraid that the TRC hearing would cause a procedural problem during trial. In the given legal context and in view of the fact that the Special Court has only a very limited number of cases (and thus cannot take procedural risks) I support its decisions.

The importance of the decisions now lies in its meaning for future situations. If concurrent are to be established, the relationship between the various institutions should be clarified.⁴⁵ As Schabas wrote, post-conflict justice may require a complex mix of therapies, rather than a unique choice of a single approach from a menu of alternatives.⁴⁶ A limited number of defendants and limited mandate such as the Special Court may dictate other solutions than in other situations.⁴⁷ It is therefore that the Sierra Leone TRC does not make a recommendation on which particular model ought to be adopted.⁴⁸ But one part of the message is crystal clear: if a country chooses to have concurrent alternatives, attention should be paid to their relationship.

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⁴⁵ James Cockayne, The Fraying Shoestring: Rethinking Hybrid War Crimes Tribunals, 28 Fordham International Law Journal 2005, p.616-680; Evenson, p.760-767.

⁴⁶ William A. Schabas, Conjoined Twins of Transitional Justice?, 2 Journal of International Criminal Justice 2004, p. 1088. A.H. Klip and A.L. Smeulers, Afrekenen met het verleden: de afdoening van internationale misdrijven, in: Klip/ Smeulers/ Wolleswinkel, KriTies, Liber amicorum et amicorum voor prof. mr. E. Prakken, 2004, p.313-330.

⁴⁷ Evenson, p.765-766.

⁴⁸ Recommendations, par. 475, p.67.